In his affidavit dated March 8, 1974 the defendant states that he failed to enter appearance within the specified period simply because when he was served with the writ of summons on February 7, 1974 he was under the mistaken impression that it was not meant by way of service on him. According to him he contacted Mr. Tee Keng Hoon, a Legal Assistant with Messrs Allen & Gledhill as early as February 11, 1974 yet he told the Legal Assistant that the summons was not meant by way of service on him. He reassured the Legal Assistant again on February 12 and 13, 1974 that a copy of the summons had not been served on him.

On February 23, 1974 the defendant received a copy of the Notice of Motion (enclosure 3) and so on February 25, 1974 the defendant went to see the Legal Assistant again and finally on February 27, 1974, his solicitors entered an appearance on his behalf.

It is however apparent on the face of the Writ of Summons (enclosure 1) that it was served on the defendant as a defendant and not as a witness. Moreover, if he thought that it was not meant by way of service on him, it is inconceivable why he should contact a Legal Assistant repeatedly on February 11, 12 and 13, 1974 and also why he had to reassure the Legal Assistant that he had not been served. A supporting affidavit from the Legal Assistant is also lacking. In the circumstances the defendant's explanation for his failure to enter an appearance within the stipulated period does not appear to be very convincing.

The remaining aspect of the defendant's affidavit is confined to a defence on the merits. It is the defendant's case that since the previous owners did not raise any objection to his entry and as he has incurred considerable expenditure in erecting the building on the land in expectation of being allowed to stay as long as he likes, he is a licensee and therefore the notices to quit are ineffective and the plaintiff is estopped from alleging that the defendant is a trespasser. In support of this argument the defendant relies on the following authorities:—

(a) *Sir J. W. Ramsden, Bart.* v. *Lee Dyson and Joseph;*[1]

(b) *Plimmer and Anor.* v. *The Mayor, Councillors and Citizens of the City of Wellington;*[2]

(c) *Inwards & Ors.* v. *Baker;*[3]

(d) *Hopgood* v. *Brown;*[4]

(e) *Ward* v. *Kirkland;*[5]

(f) *E. R. Ives Investments Ltd.* v. *High.*[6]

In short, the plaintiff's argument is that although the defendant was a licensee, he was only a bare licensee and his licence was terminated by the plaintiff's notice to quite served on the defendant and any further occupation by the defendant after the expiration of the period stated in the notice, the defendant occupied it as a trespasser and could lawfully be ejected.

From the facts of the case it would appear that when the defendant moved in and erected a building in 1962 on a portion of the land known as E.M.R. 4236 Lot 689, Mukim of Petaling, District of Kuala Lumpur, the owners of the said land were Yee Seng Rubber Co. Sdn. Bhd. and no objection was raised by the owners. It was only about 10 years later that the defendant for the first time received an objection from the owners by a notice to quit dated July 5, 1972 followed by another notice to quit dated July 21, 1972. Subsequently on January 12, 1973 the defendant received yet another notice to quit but this time from the plaintiff who is the present owner.

Coming back to the authorities relied upon by the defendant it would appear that in those cases the defendant went and occupied the land either as a result of a mistaken belief that it was their own land, or that they were invited on to the land by the owner or that they had the consent of the owner. In my view these authorities can therefore be distinguished from the present case because in the present case the defendant entered the land neither as the result of a mistaken belief, nor at the invitation of the owner or with the consent of the owner. In my opinion a licence passes no interest and a mere licence is always revocable, but when a licence is coupled with an interest, or if granted for valuable consideration, it is in general irrevocable. See *Hurst* v. *Picture Theatres Ltd.*[7] Further, in the case of *Gurbachan Singh* v. *Sharikat Bakti Ltd.*[8] the Federal Court allowed the appeal and set aside the order of the High Court giving leave that judgment be summarily entered against the defendant because the defendant raised the issue that he had been a lawful tenant of the land by paying ground rent to the agent of the previous owner of the land and that he was not a bare licensee. The question of paying any rent is not raised in the defendant's affidavits and therefore applying the principles set out in *Gurbachan Singh* v. *Sharikat Bakti Ltd.* the defendant's application must fail. The application is therefore dismissed with costs.

Application dismissed.

Solicitors: *Shearn Delamore & Co.; Allen & Gledhill.*

PHILIP HOALIM JR. & ANOR. v. STATE COMMISSIONER, PENANG

[F.C. (Azmi L.P., Ali and Raja Az'an Shah F.JJ.) June 10, 1974]

[Penang — Federal Court Special Case No. 1 of 1973]

Land Law — Lands in Penang originally granted by East India Company or High Commissioner on behalf of British Crown — Replacement titles issued — Whether such land alienated land — Whether it is "land alienated before the commencement of the Code" — Whether Governor bound in regard to rights, liabilities and obligations which formally bound Her Majesty's Government — Legislation imposing or providing for increase of rent — Whether legislation contrary to Federal Constitution — Federal Constitution arts. 13 and 167(2)(a) — National Land Code (Penang and Malacca Titles) Act, 1963 — National Land Code, 1965, ss. 5, 101(1) and 102(1).

In this case the applicant had by notice of motion filed in the High Court asked that certain orders made under the National Land Code, 1965 be declared null and void. One of these orders had the effect of making the applicant's land, which was originally granted by the East India Company or the British High Commissioner on behalf of the British Crown, subject to rent. The learned judge of the High Court stated a case for the opinion of the Federal Court as he was of the view that a question as to the effect of the Federal Constitution had arisen. The questions framed by the learned judge were as follows:—

1. Whether as successor of Her Majesty's Government in respect of the Settlement of Penang, the Governor of the State of Penang is bound by reason of Article 167(2)(a) of the Constitution, towards its subject in regard to the rights, liabilities and obligations which formally bound Her Majesty's Government towards them;
2. Whether the legislations, namely L.N. 478165, P.U. (A) 526/69, Pg. P.U. 39/69 and Pg. P.U. 4/70 are not only contrary to the said Article 167(2)(a) but are also tantamount to deprivation of property under Article 13(1);
3. Whether the said land is "alienated land" for the purpose of the National Land Code".
4. Whether it is within the competency of the State Authority for the State of Penang to enact laws namely Pg. P.U. 39/69 and Pg. P.U. 4/70 affecting the rights previously enjoyed by its subjects and for the purpose of this motion, whether those rights are to be deemed "vested rights".

Held: (1) land granted by the British Crown before the commencement of the National Land Code 1965 and now held under a replacement title is not "alienated land" within the meaning of section 5 and for the purposes of section 101(1) of the National Land Code, 1965;

(2) such land is "land alienated before the commencement of the Code" for the purpose of section 102(1) of the National Land Code, 1965;

(3) as section 102(3) of the National Land Code expressly provides that a direction under sub-section (1) shall apply to any land notwithstanding that it is held rent free or subject to any express provision in the document of title that rent thereby reserved shall not be capable of revision and as the applicant's land is "land alienated before the commencement of the Code", it is affected by Pg. P.U. 39/69;

(4) L.N. 478/65 which creates a presumption that land held under interim title or final replacement title is land alienated before the commencement of the Code, is not *ultra vires* section 439 of the National Land Code;

(5) Pg. P.U. 4/70 applies only to alienated land and does not apply to the applicant's land;

(6) no question as to the effect of Article 167(2)(a) or Article 13(1) of the Federal Constitution has arisen for the consideration of the court;

(7) the first three questions in the case stated must be answered in the negative and the fourth in the affirmative and therefore the case should be sent back to the High Court with a direction that the motion be dismissed with costs.

Case referred to:-

(1) *Oriental Holdings* v. *Government of the State of Penang and Government of Malaysia* [1972] 2 M.L.J. 248.

FEDERAL COURT.

Lim Kean Siew (*I. K. Cheah, Philip Hoalim Jr., W. A. Goh* and *Pamela Ong* with him) for the applicants.

Abu Talib bin Othman (State Legal Adviser, Penang) for the respondent.

Ali F.J.: By a Notice of Motion dated August 11, 1970 filed in the High Court, Penang, Philip Hoalim Jr. and Wembley Alexandra Goh (m.w.) asked that certain orders made under the National Land Code Act No. 56 of 1965, which I shall refer to as the Code, be declared null and void. In their affidavit they said that these orders are "unlawful, wrongful and contrary to the Constitution". The reason for the motion is that one of the orders, referred to in the present proceedings as Pg. P.U.39/69, appears to have the effect of making the applicants' land subject to rent. We were informed at the hearing that several other owners of lands are similarly affected and they, too, have instituted similar proceedings in the High Court, Penang.

The instant case and another listed as Special Case No. 2 have come to this court in this way. When the motion was before him, H. S. Ong J. (as he then was) found it necessary to state a case for the opinion of this court under section 48 of the Courts of Judicature Act, 1964, being of the view that a question as to the effect of the Federal Constitution has arisen. He did so although there was before him a summons in chambers in which the State Commissioner for Lands, the respondent, has asked that the motion be struck out or dismissed on procedural grounds. On the assurance of counsel for the applicants that this and Special Case No. 2 are in the nature of test cases we agreed to hear arguments. We hope that our decision in both cases will be sufficient to dispose of the various questions that have arisen as a result of the order or orders made by the State Government.

The learned judge framed four questions as follows:

1. Whether as successor of Her Majesty's Government in respect of the Settlement of Penang, the Governor of the State of Penang is bound by reason of Article 167(2)(a) of the Constitution towards its subject in regard to rights, liabilities and obligations which formally bound Her Majesty's Government towards them;
2. Whether the legislations, namely L.N. 478/65, P.U.(A) 526/69, Pg. P.U. 39/69 and Pg. P.U. 4/70 are not only contrary to the said Article 167(2)(a) but are also tantamount to deprivation of property under Article 13(1);
3. Whether the said land is "alienated land" for the purpose of the National Land Code; and
4. Whether it is within the competency of the State Authority for the State of Penang to enact laws, namely Pg. P.U. 39/69 and Pg. P.U. 4/70 affecting the rights previously enjoyed by its subjects and for the purpose of this motion, whether those rights are to be deemed 'vested rights'.

All these questions are to be considered in the context of the applicants' claim that their land which is land held under a replacement title issued pursuant to the provisions of the National Land Code (Penang and Malacca Titles) Act No. 2 of 1963, which I shall refer to as the 1963 Act, is not "alienated land" for the purpose of an order under section 101(1) of the National Land Code Act No. 56 of 1965, the Code, or is not "land alienated before the commencement of the Code" for the purpose of a direction under section 102(1) of the Code. Suffice it for me to say that lands held under replacement or final replacement titles are in fact lands originally granted by the East India Company or by the British High Commissioner on behalf of the British Crown during the period when Penang was a British possession. Documents of original title to such lands such as Indentures or Statutory Land Grants, as the case may be, have by reason of the 1963 Act been replaced by new titles, *i.e.* replacement titles which ultimately would become final replacement titles. The said Act came into force on the same day as the Code, *i.e.* January 1, 1966. Sections 101(1) and 102(1) of the Code are in these terms:

"101 (1) Subject to the provisions of sub-section (5), the State Authority may from time to time revise in accordance with the following provisions of this section the rents payable in respect of alienated lands within the State."

and section 102(1) provides:

"102 (1) The State Authority may, at any time before it first revises any rents in the State under section 101, direct with respect to any class or description of lands alienated before the commencement of this Act that, as from the beginning of such calendar year as may be specified in the direction, rent shall become payable at the standard rate in the case of all such lands other than any which are already subject to a higher rate."

In view of the applicants' claim it is necessary to ascertain the meaning of "alienated land" in section 101(1) and of "land alienated before the commencement of the Code" in section 102(1) referred to above. In section 5 of the Code "alienated land" is defined thus:

"any land (including any parcel of a sub-divided building) in respect of which a registered title for the time being subsists, whether final or qualified, whether in perpetuity or for a term of years, and whether granted by the State Authority under this Act or in the exercise of powers conferred by any previous land law, but does not include mining land."

Does this include land granted by the British Crown before the commencement of the Code, that is to say, land now held under replacement title? In my view it does not because the words "and whether granted by the State Authority under this Act or in the exercise of powers conferred by any previous land law" properly construed would refer only to land granted by the State Authority which as defined in the Code means the Ruler or Governor of a State, as the case may be. So the answer to the third question in this case is No.

If the applicants' land is not alienated land for the reasons stated above, does it then fall within the expression "land alienated before the commencement of the Code" for the purpose of section 102(1) of the Code? The said expression is not defined but the word "alienated" in the present tense is defined as follows:

" 'alienate' means to dispose of State land in perpetuity or for a term of years, in consideration of the payment of rent, and otherwise in accordance with the provisions of section 76 or, when used in relation to the period before the commencement of this Act, to dispose of State land in perpetuity or for a term of years under a previous land law (not being a law relating to mining)."

Simply stated, "alienate" means to dispose of State land or to dispose of land in the State. See definition of "State land" in section 5 of the Code. The applicants' argument that the word "alienated" cannot be used in respect of land granted or disposed of before Penang became a State is therefore devoid of any merit. On this view of the word "alienated" the applicants' land clearly comes within the expression "land alienated before the commencement of the Code" for the purpose of section 102(1) of the Code. As such it is affected by Pg. P.U. 39/69. The fact that it was not previously subject to rent is of no consequence for in subsection (3) of section 102 it is clearly provided that a direction under subsection (1) shall apply to any land notwithstanding that it is held rent free or subject to any express provision in the document of title that rent thereby reserved shall not be capable of revision.

In the course of arguments our attention was drawn to paragraph 2(a) of the Schedule to L.N. 478/65 which is in these terms:

"2. Subject to this Schedule and where the context does not otherwise require —

(a) land held under interim title or final replacement title shall be deemed to be land alienated before the commencement of the Code, and references to alienated land shall be construed accordingly."

On page 13 of his written submission counsel for the applicants said that this presumption is an attempt by subsidiary legislation to redefine "alienated land", that is to say, an attempt to amend the National Land Code. L.N. 478/65 was made under section 439 of the Code which does not give the power to amend the Code. But as may be noticed the words used in the said paragraph are not "alienated land" but "land alienated before the commencement of the Code" which expression as I have just construed above must include land alienated by the British Crown, *i.e.* land held under replacement or interim title or final replacement title. Whatever may be its purpose the presumption in paragraph 2(a) of the Schedule is certainly not outside the scope of the power conferred by section 439 of the Code. Accordingly, the argument that it is an attempt to amend the Code is without merit or substance. The second question refers also to P.U.(A)526/69 which is merely an order to amend L.N.478/65 and, therefore, does not require further consideration. As for Pg. P.U.4/70 which is also referred to, this can be disposed of in a few words. The order was made under section 101(1) of the Code for the purpose of revising rents payable in respect of alienated lands. Its remarkable feature is that it refers to lands and prescribes rents which are identically the same as those referred to or prescribed in the Schedule to Pg. P.U.39/69. Whether or not Pg. P.U.4/70 was intended to effect a revision of the standard rents prescribed in Pg. P.U.39/69 is not at all clear. What must be clear is that it does not or cannot apply to lands other than alienated lands. In other words, it does not apply to the applicants' land. If not, I see no reason why Pg. P.U.4/70 should be declared null and void.

Having disposed of the applicants' arguments against L.N.478/65, P.U.(A)526/69, Pg. P.U.39/69 and also Pg. P.U.4/70 as mentioned in the second question posed by the learned judge I shall now turn to the arguments in relation to Article 167(2)(a) of the Constitution as mentioned in the first question and in relation to Article 13(1) as mentioned in the second question.

Article 167(2)(a) was in these terms:

"167. (2) Subject to the provisions of this Article, all rights, liabilities and obligations of —

(a) Her Majesty in respect of the government of Malacca or the government of Penang,

shall on and after Merdeka Day be the rights, liabilities and obligations of the respective States."

It was repealed in 1963 and, as contended by the learned Legal Adviser, Penang, has no application to the present dispute. The applicants, on the other hand, maintained that they have a vested right notwithstanding the repeal. By this was apparently meant that their right to hold the land rent free continues to be protected by the said provision of the Constitution even though

it is no longer in force. Article 167(2)(a), as I understand it, was concerned with the legal or constitutional position of Her Majesty and the Government of the State of Penang or Malacca, as the case may be, on or after Merdeka Day as regards rights to sue, liabilities to be sued or obligations arising from contract or otherwise. In terms so provided it is difficult to conceive how this provision can have anything to do with the applicants' right to their land. It was, I think, argued in somewhat general terms that the Indenture granted by the East India Company on behalf of the British Crown was binding on Her Majesty and on the Penang State Government. The suggestion was that the Indenture was a contract and that Her Majesty was under an implied obligation to ensure that the land shall not be subject to rent. Indian cases have been cited for the view that Crown grants are not binding on State legislatures. I do not find it necessary to consider those authorities as I am of the view that the Indenture in this case was not a contract for the purpose of Article 167(2)(a) of the Constitution. Suffice it for me to say that Parliament has wide powers to make laws which are not inconsistent with the Constitution. It has not been suggested that section 102 of the Code to the extent that it affects lands granted by the British Crown in the matter of rents is beyond the powers of Parliament to enact or inconsistent with Article 167 (2)(a). The learned Legal Adviser was perfectly right in saying that the said provision has no application whatsoever. I feel bound to say with respect to the learned judge who framed the first question that no question as to the effect of Article 167(2)(a) of the Constitution has arisen for the consideration of this court. The answer to this question, as it must be, is No.

Likewise I must say that no question as to the effect of Article 13(1) of the Constitution has arisen for the consideration of this court. The said Article clearly does not restrict legislative powers but merely declares unconstitutional or prohibits any illegal executive acts of depriving property. See commentary on this provision by *Sheridan and Groves* in "The Constitution of Malaysia" on page 44. The four orders named in the second question, particularly Pg. P.U. 39/69, do not have the effect of depriving any person of his property. Pg. P.U.39/69, for instance, does no more than what is permitted to be done by section 102(1) of the Code. If the applicants' right is affected by any of the said orders it is because Parliament has provided that it can be so affected. Article 13(1) of the Constitution does not restrict the legislative powers of Parliament.

The first three questions must, therefore, be answered in the negative and the fourth in the affirmative.

Accordingly, I would send this case back to the High Court with a direction that the motion be dismissed with costs. The applicants shall also pay the costs of the proceedings in this court.

As regards the procedure followed in this case it is sufficient to say that the Rules of the Supreme Court, 1957 govern all civil proceedings in the High Court. Order 1 rule 1 provides that all proceedings of a civil nature in the High Court shall be by way of action unless otherwise provided in the Rules or in any other written law. In terms of Order 72, the English practice could only be resorted to if there is no provision in our Rules or in any written law in force in the country to govern the present proceedings. I fail to see why the applicants should not have proceeded by way of action as was done in the case of *Oriental Holdings* v. *Government of the State of Penang & Government of Malaysia.*[1]

Azmi L.P. and **Raja Azlan Shah F.J.** concurred.

Questions answered.

Solicitors: *Lim Kean Siew & Co.*

LAU GEOK SWEE & CO. SDN. BHD. v. STATE COMMISSIONER, PENANG

[F.C. (Azmi L.P., Ali and Raja Azlan Shah F.JJ.) June 10, 1974]

[Penang — Federal Court Special Case No. 2 of 1973]

Land Law — Land held under Statutory Land Grant — Replacement title issued — Orders made for revision of rent payable — Whether contrary to the Federal Constitution — National Land Code, 1965, s. 102.

In this case the applicant applied by motion to have certain orders made under the National Land Code declared null and void. The case was referred to the Federal Court and was heard together with Federal Court Special Case No. 1 of 1973.[1]

Held: (1) in terms of section 102(3) of the National Land Code a direction under sub-section (1) of the section applies to any land notwithstanding any express provision in the document of title that rent reserved thereby shall not be capable of revision and therefore Pg. P.U. 39/69 or perhaps Pg. P.U. 4/70 applies to the land in question so that rent at a higher rate as prescribed in either of the said orders would become payable in respect thereof as from 1st January 1970;

(2) the land in question is land alienated before the commencement of the Code and not alienated land for the purpose of the Code;

(3) the answers to the four questions in this case are the same as in Special Case No. 1 and the case should be sent back to the High Court for the motion to be dismissed with costs.

Case referred to:-

(1) *Philip Hoalim Jr. & Anor.* v. *State Commissioner, Penang* [1974] 2 M.L.J. 100.

FEDERAL COURT.

Lim Kean Siew (*I. K. Cheah, W. A. Goh* and *Pamela Ong* with him) for the applicants.

Abu Talib bin Othman (State Legal Adviser, Penang) for the respondent.

Ali F.J.: This case having been referred to this court under section 48 of the Courts of Judicature Act, 1964 was heard together with Special Case No. 1 of 1973. It arose out of a motion by Lau Geok Swee & Co. Sdn. Bhd., whose land now held under a replacement title was originally granted by the British High Commissioner on behalf of the British Crown under a Statutory Land Grant No. 145 of 1955. In the said Grant the annual rent reserved until December 31, 1981 was $4.50.